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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re H.M. et al., Persons Coming Under the Juvenile Court Law.	
SOLANO COUNTY HEALTH AND SOCIAL SERVICES DEPARTMENT, Plaintiff and Respondent, v. LILIA M., Defendant and Appellant.	A141747 (Solano County Super. Ct. Nos. J42194, J42195)

Lilia M. (Mother) challenges jurisdictional findings and a removal order in this juvenile dependency case. We conclude the juvenile court's jurisdictional findings as to Mother and its order removing her younger daughter from her care are supported by substantial evidence. Mother's challenges to other jurisdictional findings and removal of her older daughter are moot. However, Mother also challenges a finding that notice of the case was provided to Indian tribes as required by the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.). We agree that the record does not establish proper ICWA notice; therefore, we reverse the jurisdiction and disposition orders and remand for the purpose of ensuring compliance with ICWA notice requirements.

I. BACKGROUND

At the time this dependency case began in October 2013, Mother lived with her 22-month-old daughter S.T. in a duplex unit (the family home). Mother's 17-year-old

daughter H.M. had been staying with family and friends since June, but still visited the family home occasionally. H.M.'s father, N.H., lived in a converted garage unit of the family home. S.T.'s father, J.T., had not been in recent contact with the family and his whereabouts were unknown. Mother's two other school-age daughters lived with their father, C.P.

On September 27, 2013, N.H. and H.M. got into an argument in the garage unit, and the argument escalated into a physical confrontation. N.H. bit H.M., punched her in the face, and threw her on the ground. H.M. required medical care and four stitches, and N.H. was arrested for felony child abuse. Neither Mother nor S.T. was present during the incident, but Mother reportedly blamed H.M. for the incident.

H.M. reported that N.H. became drunk every day, occasionally used methamphetamine, and was "usually violent." Both H.M. and Mother's relatives—her mother D.H. (Grandmother) and sisters M.C. and A.M. (Aunt M.C. & Aunt A.M.) (collectively Relatives)—reported that Mother abused drugs, made delusional and paranoid statements, and neglected S.T., and that the family home had no electricity or hot water. S.T. had a burn mark on her arm that was healing, but otherwise appeared healthy and developmentally on track.

On October 1, 2013, the Solano County Health and Social Services Department (Department) filed a Welfare and Institutions Code section 300[1] juvenile dependency petition on behalf of H.M. and S.T. As amended on October 17, the petition made the following allegations.

As to N.H.,[2] the petition alleged he had engaged in a violent altercation with H.M. (§ 300, subd. (a) [serious physical harm]); he had a history of alcohol abuse that "periodically impact[ed] his ability to parent his child" and failed to make adequate arrangements for the care of H.M., who frequently sought housing outside the family residence (§ 300, subd. (b) [failure to protect]; hereafter section 300(b)); and S.T. was at

[1] Undesignated statutory references are to the Welfare and Institutions Code.

[2] The original petition named N.H. as an alleged father. He was declared H.M.'s presumed father at the October 2, 2013 detention hearing.

risk of neglect and physical harm due to the violent altercation between N.H. and H.M., which had occurred in the family home (§ 300, subd. (j) [abuse of sibling]).[3]

As to J.T.,[4] the petition alleged he had a history of domestic violence with Mother (§ 300(b) & § 300, subd. (c) [serious emotional damage]). J.T.'s whereabouts were alleged to be unknown, as was his ability to care for S.T. because he was a registered sex offender who had been convicted of sexual battery and lewd and lascivious acts with a child under the age of 14 (§ 300(b) & § 300, subd. (g) [no provision for support]).

As to Mother, the petition alleged pursuant to section 300(b) that she had a history of substance abuse, including methamphetamine use, which "periodically impact[ed] her ability to parent her children"; she did not make adequate provisions for the care of H.M., who frequently sought out alternative housing; she neglected the children by not providing a home with electricity, using drugs in their presence and while caring for them, and frequently leaving S.T. in the care of inappropriate caregivers; and she failed to produce S.T. during the child welfare investigation so S.T.'s safety could be assessed. A separate section 300(b) allegation stated that Mother had "unaddressed mental health issues" manifested by delusional and paranoid statements and actions that periodically prevented her from meeting her children's basic needs of immediate safety." These issues also were alleged to prevent Mother from ensuring H.M.'s attendance at school and S.T. and H.M.'s receipt of routine medical and dental care. Separate section 300(b) and section 300, subdivision (c) allegations stated that Mother had a history of domestic violence with J.T. that sometimes occurred in the minors' presence, and she did not cooperate with law enforcement to protect her children.

H.M. and S.T. were detained on October 2, 2013, and ultimately placed together with Grandmother. J.T. was located in custody and appeared at the October 24, 2013

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[3] The section 300, subdivision (j) allegation also referred to Mother's substance abuse, but this language was later stricken on the Department's own motion.

[4] The original and amended petitions named J.T. as an alleged father. After paternity testing excluded C.P., J.T. was declared S.T.'s presumed father in the juvenile court's written jurisdiction findings.

jurisdiction and disposition hearing. At a November 21, 2013 hearing, N.H. waived reunification services and submitted on the reports regarding jurisdiction. The court sustained the section 300(b) and section 300, subdivision (a) allegations as to N.H. The section 300, subdivision (j) allegation was not initially addressed by oversight, but was subsequently sustained. Contested hearing on the remaining allegations was repeatedly continued until April 21, 2014, due to a conflict declared by Mother's counsel, appointment of new counsel, and Mother's hospitalization. Before the hearing took place, the Department moved to strike the 300, subdivision (c) allegation regarding domestic violence (but not the similar section 300(b) allegation) and the references to J.T.'s whereabouts being unknown. The court implicitly granted that motion, as the jurisdiction and disposition orders refer to the petition "as amended on" April 21, 2014, and no ruling was made on the section 300, subdivision (c) allegation.

At the combined jurisdiction and disposition hearing, Aunt M.C., Aunt A.M., and the social worker were called as witnesses by the Department. H.M., Grandmother, Mother's duplex neighbor, and three acquaintances were called as witnesses by Mother. Mother, J.T. and N.H. did not testify. The court sustained the substance abuse and mental health allegations as to Mother. The court found unproved the allegations regarding domestic violence between Mother and J.T. and the allegation that J.T. was unable to provide for S.T. The court removed the children from their parents' care and ordered reunification services for Mother and J.T. A combined six- and 12-month status review hearing was scheduled for October 2014. H.M. turned 18 years old in July 2014. Mother appeals, challenging the jurisdictional findings (except for the § 300, subd. (a) allegation as to N.H.), dispositional order removing both children from her care, and adequacy of ICWA notice.

II. DISCUSSION

A. *Jurisdiction*

Mother argues the juvenile court's jurisdictional findings as to her are not supported by substantial evidence. We affirm the findings.

"The Department has the burden of proving by a preponderance of the evidence that the children are dependents of the court under section 300. (§ 355, subd. (a); [citation].) [¶] . . . 'In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial evidence, contradicted or uncontradicted, supports them. "In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court." [Citation.] "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] ' "[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate]." ' [Citation.]" [Citation.]' [Citation.]" (*In re I.J.* (2013) 56 Cal.4th 766, 773.)

1. *Mootness*

Mother acknowledges that generally " '[w]hen a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the [trial] court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence.' [Citation.]" (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762.) Specifically, when jurisdictional findings as to one parent are not challenged on appeal, the appellate court may affirm jurisdiction without considering whether substantial evidence supports jurisdictional findings as to another parent. (See *ibid.*) Because Mother does not challenge the section 300, subdivision (a) finding as to N.H., her challenge to the other jurisdictional findings could be deemed moot.

As Mother further notes, however, this mootness doctrine has exceptions. "[W]e generally will exercise our discretion and reach the merits of a challenge to any

jurisdictional finding when the finding (1) serves as the basis for dispositional orders that are also challenged on appeal [citation]; (2) could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings [citations]; or (3) 'could have other consequences for [the appellant], beyond jurisdiction' [citation]." (*In re Drake M., supra,* 211 Cal.App.4th at pp. 762–763.) Here, the sustained allegations as to Mother formed the basis for the court's removal of H.M. and S.T. from her care, which she challenges on appeal. Moreover, the Department defends the findings on the merits. We therefore exercise our discretion to review the jurisdictional findings as to Mother. However, the jurisdictional findings and disposition orders with respect to H.M. have become moot because she has turned 18. We decide this case solely with respect to S.T., who is currently three years old.[5]

2. *Section 300*(*b*)

A section 300(b) finding " 'consists of three elements: (1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) "serious physical harm or illness" to the minor, or a "substantial risk" of such harm or illness.' [Citation.] The third element 'effectively requires a showing that *at the time of the jurisdiction hearing* the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur). [Citations.]' [Citation.] ' "[Section 300(b)] means what it says. Before courts and agencies can exert jurisdiction under [section 300(b)], there must be evidence indicating that the child is exposed to a

[5] Given the mootness of issues relative to H.M., we need not consider Mother's challenges the juvenile court's section 300(b) finding that N.H. had a history of alcohol abuse that impacted his ability to parent H.M. and that he failed to make adequate arrangements for H.M.'s care. Additionally, we need not decide whether the court's section 300, subdivision (j) finding that S.T. was at risk of harm due to N.H.'s assault on H.M is supported by the evidence because, as discussed *post*, findings as to Mother were supported by the evidence and those findings alone are sufficient to support S.T.'s removal order. (See *In re Drake M., supra,* 211 Cal.App.4th at p. 762 [unless an exception otherwise applies, challenge to jurisdictional findings as to one parent are moot if findings as to other parent are affirmed on appeal].)

substantial risk of *serious physical* harm or illness." [Citation.]' [Citation.]" (*In re David M.* (2005) 134 Cal.App.4th 822, 829, first italics added.)

Section 300(b), however, "does not require that a child actually be abused or neglected before the juvenile court can assume jurisdiction. The subdivisions at issue here require only a 'substantial risk' that the child will be abused or neglected. The legislatively declared purpose of these provisions 'is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm.' (§ 300.2, ...) 'The court need not wait until a child is seriously abused or injured to assume jurisdiction and take the steps necessary to protect the child.' [Citation.]" (*In re I.J., supra,* 56 Cal.4th at p. 773, italics omitted.) Moreover, the Legislature has specifically declared "[t]he provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child." (§ 300.2.)

3. *Substance Abuse Finding*

The juvenile court sustained an allegation that Mother "has a history of abusing controlled substances, including methamphetamines, that periodically impacts her ability to parent her children." Mother argues there was insufficient evidence that she used methamphetamines or otherwise had a substance abuse problem. She notes that no witness claimed to have personally observed her using methamphetamine, and she had tested positive only for marijuana. In fact, the juvenile court expressly noted "[t]here [wa]s no positive test showing use of methamphetamine or any other controlled substance by [Mother]." She cites cases holding that a custodial parent's substance use alone is insufficient to establish "substance abuse" or juvenile dependency jurisdiction. We conclude substantial evidence supports the juvenile court's substance abuse finding.

Direct evidence indicated Mother used marijuana in the one or two years before, as well as during, the dependency case. Aunt A.M., who testified that she frequently stopped by Mother's home to check on the children, told the Department that Mother

smoked marijuana throughout the day. K.T., J.T.'s sister who said she had known Mother since they were children, similarly reported that Mother was " 'always high' " on marijuana.[6] Mother tested positive for marijuana each of the three times she was drug tested during the dependency proceedings (twice in October 2013; once in April 2014). Further, the family home smelled strongly of marijuana when a social worker made an unannounced home visit on October 22, 2013; Mother and her boyfriend were present and said they did not possess medical marijuana cards.

Direct evidence also was presented that Mother *possessed* and *sold* methamphetamine in the year or two before the start of the dependency case. H.M., a witness the juvenile court found highly credible, testified that she saw tiny black scales and methamphetamine in the family home. She described the drug as looking like small diamonds and its smoke as having a nasty chemical odor. Although the court stated, "I'm not positive exactly what information [H.M.] has that would allow her to determine what this white substance was and identify its odor," the court did not state it was discounting the testimony; rather, we assume the comment went to the weight of the evidence. (H.M., however, did testify that her boyfriend used methamphetamine.) H.M. said she did not believe Mother had a job for the previous two years, and Mother never told H.M. where she was going when she left the house, even when H.M. asked. Aunt M.C. testified Mother came to her house sometime in 2013 with a large amount of crystal methamphetamine, and Mother said she needed to package it for sale. Grandmother

[6] K.T.'s statements were included in Department reports, and K.T. was not made available for cross-examination at the hearing. Mother objected to the statements as hearsay. A hearsay statement contained in a social study generally cannot "by itself . . . support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based." (§ 355, subd. (c)(1).) Thus, K.T.'s statement that Mother was always high on marijuana was not sufficient *by itself* to support a jurisdictional finding. Although section 355, subdivision (c) limits the extent to which such social study hearsay evidence can be relied on exclusively, "there is no limitation, except for fraud, deceit, or undue influence, on the admission of hearsay evidence." (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1243, fn. omitted.) We cite the statement as *additional* evidence supporting the substance abuse finding, which was well supported by witness testimony at the hearing.

testified Mother had once admitted selling drugs. In October 2013, Mother told the Department she had no income, and the social worker suspected Mother was engaged in illegal income-generating activity.

Strong circumstantial evidence supported a conclusion that Mother *used* methamphetamine periodically, if not regularly, in the few years before and during the dependency case. In February 2011, Mother was arrested for being under the influence of a controlled substance. The police report noted symptoms of stimulant use, including rapid speech, facial twitching, fluttering eyelashes and a pulse rate of 140 beats per minute. Mother spontaneously told the officer that she was not under the influence of methamphetamine, but had used Vicodin without a prescription. However, a social worker stated that in her experience Vicodin reduces rather than increases heart rate. H.M. testified to having seen white powder on Mother's nose in September 2013, smelling the "nasty chemical" odor coming from the bathroom while Mother and other people were in there, and seeing Mother "do paperwork all tweaked out" and then "sleep for days on end." Aunt A.M. told the Department she had seen white powder in and around Mothers' nose in September 2013, and at the hearing she implied she had seen it repeatedly. Aunt M.C. testified Mother had admitted to her more than once that she struggled with drug use, and Mother said she was having a hard time not using the methamphetamine she brought to M.C.'s house for packaging in 2013. Although Mother's October 2013 hair follicle test was negative for methamphetamine, Mother arrived late to the test with freshly dyed hair. A social worker testified that numerous Internet sites claimed that stripping and dying hair can possibly reduce drug testing results below the cut-off point for a positive test. Mother said that the hair dye treatment had been a birthday present from her children with C.P., but C.P. contradicted Mother's claim. H.M., K.T. and Relatives believed Mother was using methamphetamine, and Relatives had tried several times to intervene with Mother and get her help. C.P. had also expressed concern to the Department about Mother's drug use, although he more recently denied such concern.

Several witnesses reported having seen dramatic changes in Mother over the previous two years, which they suspected was caused by methamphetamine use: significant weight loss, skin deterioration, abandonment of her profession, erratic emotional behavior, and paranoid and delusional statements.[7] A social worker, who was qualified as an expert in child welfare services and had specialized training in detecting substance abuse, opined that Mother displayed combative and avoidance behaviors consistent with substance abuse. When the Department contacted Mother following the September 27, 2013 incident between H.M. and N.H., Mother made a tentative appointment to meet with the social worker on September 30, but did not attend, call to reschedule, or return the social worker's calls. When another social worker visited the family home on October 2, a note left by the prior social worker on September 30 was still in the door jamb. The social worker first met with Mother at the October 2 detention hearing, at which time Mother was argumentative. That day she tested positive for marijuana. As noted, Mother arrived late and with freshly-dyed hair to a hair follicle drug test on October 21 that would detect drug use for the previous 90 days. After these

[7] H.M. testified that Mother made untrue statements like "my grandma is not my grandma"; "[Mother is] sick and dying with cancer or other diseases"; "we have trusts and bonds and . . . we're rich and we own McDonald's"; "everybody was taking things from her." Aunt M.C. testified to "strange conversations" in which Mother indicated Grandmother was not her mother, Grandmother sold Mother to the government for cancer testing, Mother was going to come into millions of dollars of trust fund money that Grandmother was hiding, Mother's family was stealing from her. A social worker reported that when she tried to discuss the allegations of the petition with Mother, Mother would "repeatedly disengage and attempt discussion regarding various topics that have nothing to do with this dependency matter. For example, she will make statements that her mother is not her mother and her sisters are not her sisters. She talks of the deceased and prior owner of [her] home . . . , whom she said . . . is her biological mother. She said she believes her mother . . . is attempting to 'steal' money from her or her children. She said [H.M.] is the trustee of a very large account, which has been donated by an anonymous person . . . . She indicated that her Cal-Fresh (Food Stamp) benefits are being 'taken out on a Federal level in an unknown manner' and added repeatedly that there is 'lots' of proof about each of these topics." Similar conversations with Mother were reported by the owner of the family home, a substance abuse treatment agency intake worker, and K.T.

two drug tests, Mother missed her monthly meetings with the social worker (and thus missed associated drug testing) from November 2013 to January 2014. In February she failed to respond to phone messages asking her to drug test, and did not meet with the social worker or drug test until April 2014. Mother also missed several visits with S.T. between December 2013 and March 2014. In all of the circumstances, the court could have reasonably inferred that Mother used methamphetamine in late 2013 and avoided contact with the Department so her use would not be detected.

Mother cites contrary evidence: she denied drug use; charges were dropped for being under the influence in February 2011; hostility existed between her and the Relatives who testified she abused drugs; Mother's duplex neighbor, acquaintances, and C.P. said they had not seen signs of substance abuse in Mother, but most had witnessed Relatives harass her. The weight to be accorded contrary evidence was a determination for the juvenile court to make. The court was not precluded from finding that, on balance, the evidence established that Mother had abused and continued to abuse marijuana and methamphetamine.

Mother cites cases holding that mere use of controlled substances, especially marijuana, is not sufficient alone to establish "substance abuse" or jurisdiction, but all of the cases are distinguishable. (See, *In re Drake M., supra,* 211 Cal.App.4th at pp. 767–768 [father smoked medical marijuana outside child's presence hours before child was in his care and showed no signs of substance abuse disorder]; *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1004 [mother recently tested negative and no evidence was presented that her 11-year-old daughter was at current risk from mother's prior methamphetamine and marijuana use]; *In re David M., supra,* 134 Cal.App.4th at pp. 829–830 [mother had some history of marijuana use but no evidence of harm to children]; *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1346 [social worker opined marijuana use was not affecting mother's parenting skills]; cf. *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451–453 [jurisdiction proper where children were exposed to marijuana smoke and drug negatively affected father's demeanor].) This case is more akin to *In re Christopher R.*, where the mother's prior use of cocaine and possibly methamphetamine,

as well as her "missed . . . drug test, . . . fail[ure] to enroll in a substance abuse program[,] . . . unstable lifestyle and cavalier attitude toward childcare," all supported a finding that a substance abuse problem placed her young children at a substantial risk of harm. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1217.) For reasons explained *post*, substantial evidence supports the juvenile court's finding that Mother's use of controlled substances placed S.T. at a substantial risk of harm.

4. *Mental Health Issues Finding*

Evidence of Mother's "unaddressed mental health issues" was a subset of the substance abuse evidence, i.e., reports of delusional or paranoid statements made by Mother. Mother argues there was insufficient evidence of delusions placing S.T. at any risk of harm. We conclude that any error was harmless because the consequences flowing from this finding—dispositional orders that Mother undergo a psychiatric or psychological evaluation—would have been supported by the substance abuse finding in light of Mother's possibly drug-induced delusional and paranoid statements. (See *In re I.J.*, *supra*, 56 Cal.4th at p. 773 [when a parent challenges some but not all jurisdictional findings as to him or her, the appellate court may affirm jurisdiction without considering whether substantial evidence supports the challenged findings].) If psychological evaluation establishes that Mother's "unaddressed mental health issues" are strictly related to substance abuse, Mother may petition the court to modify its jurisdictional findings.

5. *Risk of Harm Resulting from Substance Abuse or Mental Illness*

The juvenile court found that substance abuse "periodically impact[ed] [Mother's] ability to parent" S.T., thus causing S.T. or creating a substantial risk S.T. would suffer serious physical harm or illness, because Mother failed to provide adequate housing or an adequate home environment for S.T., frequently left her in the care of inappropriate caregivers, and failed to promptly produce her during the initial investigation. The court found that Mother's "unaddressed mental health issues" caused S.T. to suffer serious physical harm or illness, or created a substantial risk that S.T. would suffer such harm, because Mother failed to "meet [S.T.'s] basic needs of immediate safety," provide her

with safe and appropriate housing, or provide her with regular medical care. We conclude substantial evidence supported the juvenile court's findings that Mother's substance abuse placed S.T. at a substantial risk of serious physical harm because Mother failed to provide appropriate housing and left S.T. with inappropriate caregivers.

a. *Housing*

At the time the dependency case started, the family home was a unit in a duplex that belonged to a friend and was in foreclosure proceedings. Mother did not keep her promise to pay the friend rent or utilities. In the summer of 2013, the friend cut off gas and electrical service to the unit. Mother used an extension cord from the neighboring unit to run the refrigerator and a lamp. Aunt A.M. testified that she could not give S.T. a bath during one visit because of the lack of hot water. H.M. reported that two days before the September 2013 incident with N.H., she found S.T. in Mother's care "very dirty, [with] greasy hair, filthy clothes, and . . . feces spilling out of her diaper," and could not get Mother to pay attention to S.T. Mother implicitly acknowledged the inappropriate conditions of the family home when she admitted to the social worker that she rarely stayed there because of a lack of electricity. Nothing indicated that Mother had planned to change these conditions absent Department intervention.

After Department intervention, Mother reported an arrangement to share gas and electrical service with a neighbor, but PG&E told the Department that shared service posed a safety danger to the entire neighborhood.[8] PG&E reported in October 2013 that electrical service had been restored to the home under a name other than Mother's and was at risk of being shut off as unauthorized. By the time of the hearing, Mother was living with her neighbors in the other duplex unit; both units had been foreclosed upon and were owned by a bank. Mother acknowledged to the social worker that she needed a

[8] The PG&E representative was not produced at the hearing for cross-examination, and Mother objected to the representative's statements as hearsay. Accordingly, the court could not rely solely on those statements to find the home's condition posed a substantial risk of physical harm to S.T. (§ 355, subd. (c)(1).) We cite them as *additional* evidence supporting the risk of harm finding, which was well supported by other admissible evidence.

new home, and she had not reported a new address to the Department. Mother's lack of a residence, combined with her choice of inappropriate residences in the past, placed S.T. at a substantial risk of harm at the time of the hearing.

Additional evidence demonstrated that the home environment Mother provided for S.T. was unhealthy because of Mother's drug use and association with drug users in the child's presence. H.M. testified she saw "different people going in and out of the bathroom" that smelled of methamphetamine smoke, and she had came home one day to find a "tweaker" in the bathroom—"just random crazy people." H.M. said she had seen Mother weighing methamphetamine with other people in the home and S.T. was usually was present when Mother and these other people were using methamphetamine. Aunt A.M., who frequently stopped by unannounced, testified she saw a lot of people in and out of the home and smelled marijuana in the home. C.P. told the Department a lot of people were in and around the home. Exposing children to drugs, drug smoke, and repeated drug use exposes them to the risk of drug ingestion. (See *In re Alexis E., supra,* 171 Cal.App.4th at p. 452; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 825.)

Additional evidence was before the court that Mother allowed inappropriate people into the home. She allowed N.H. to live in the garage unit where he later assaulted H.M. H.M. testified that N.H. would watch S.T. in the garage unit or H.M. would watch her sister there. A social worker found a man named "Anthony" in the garage unit October 2, 2013, and Mother later told the social worker, " 'I had to run that guy out of there because no one is to be there at all.' " Approximately three weeks later, the social worker saw Anthony in the garage unit again, the unit smelled strongly of alcohol, and Anthony denied having ever been asked to move out. During the same visit, the social worker reported that the family home smelled strongly of marijuana and that Mother's boyfriend, who had a history of drug offenses and of domestic violence with another girlfriend, was also present in the home. Mother acknowledged S.T. had a significant relationship with the boyfriend, and the social worker expressed concern about his ability to protect S.T. Mother had also previously lived with or exposed S.T. to J.T., who perpetrated domestic violence against her in the child's presence as recently as

May 2012.[9] Finally, H.M. reported that a large pit bull that lived in the family home had bitten two adults.

H.M.'s decision to leave the family home corroborates the evidence that Mother failed to provide a safe and healthy home environment. H.M. reported that she left the home because of Mother's substance use, and that on at least one occasion she chose to sleep in an abandoned car parked on the street rather than in the home.[10] H.M. also reported a September 2013 incident at the family home in which S.T. had been burned, allegedly due in part to lack of supervision by Mother.

The juvenile court reasonably found that Mother failed to provide a safe and healthy home environment for S.T. Given S.T.'s very young age, she was at a substantial risk of physical harm due to the lack of utilities in the home; exposure to drugs, drug smoke, and drug users and sellers in the home; and absence of a current residence for Mother at the time of the jurisdiction and disposition hearing.

b. *Inappropriate Caregivers*

Ample evidence supports the conclusion that Mother frequently left S.T. in the care of others, often for days at a time, including people who might pose a risk of harm to the child. H.M. said that Mother relied heavily on other people to care for S.T. when Mother was sleeping or "tweaking" on methamphetamine. H.M. also said Mother had left S.T. with a variety of people, including neighbors and N.H., and H.M. often missed school to take care of S.T. Aunt A.M. testified that Mother left S.T. with N.H. and the

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[9] Although the juvenile court did not sustain a finding that S.T. faced a current risk of harm due to this history of domestic violence, the court could consider the history when determining whether S.T. faced a current risk of harm due to the conditions in the family home. (See *In re T.V.* (2013) 217 Cal.App.4th 126, 133 [court may consider past events when assessing current risk of harm].)

[10] As previously noted, the juvenile court found H.M.'s testimony highly credible, thus implicitly rejecting the possibility that H.M. left the home because she was an incorrigible teenager who refused to take direction from Mother. While in Grandmother's care, H.M. regularly attended school and graduated while holding down a job—further indicating that she left Mother's home due to intolerable conditions rather than impudence.

neighbors in the other duplex unit, whom she did not believe were good caregivers. In addition to N.H.'s assault on H.M., Aunt A.M. said N.H. had "an extensive history of biting people and just being on drugs and mental problems." Grandmother, Aunt M.C. and K.T. also reported that Mother left S.T. with many different people. C.P. told the Department in October 2013 that he had been caring for S.T. for the previous four or five weeks and saw Mother "off and on" during that time. Mother's duplex neighbor testified that Mother sometimes left S.T. with Mother's daughters at C.P.'s house. The social worker testified that S.T. showed an alarming lack of stranger anxiety when she first encountered her at the courthouse on October 2, 2013. Mother's lack of personal supervision over S.T.'s care exposed S.T. to a substantial risk of physical harm. (See *In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 824 ["the absence of adequate supervision and care [of very young children] poses an *inherent* risk to their physical health and safety" (italics added)].)

c. *Other Allegations of Harm*

The evidence in support of the other section 300(b) allegations provide additional support for jurisdiction. The allegation that Mother failed to produce S.T. during the initial investigation was supported by evidence that Mother delayed in meeting with the social worker in person with S.T. until the October 2, 2013 detention hearing. This delay was evidence of Mother's avoidance behavior, which supported the substance abuse finding, and was circumstantial evidence that Mother left S.T. in the care of others and her housing was unstable. The allegation that Mother failed to ensure S.T.'s regular medical and dental care was supported by evidence that, prior to the detention hearing, S.T. had last been seen by a doctor in January 2013, and the corroborating evidence that H.M. had not seen a dentist for an unknown period, last saw a doctor in 2011, and was behind on her immunizations. Finally, evidence that Mother did not ensure H.M.'s attendance at school supported a conclusion that she neglected her children.

d. *Conclusion*

The juvenile court reasonably found pursuant to section 300(b) that Mother's substance abuse and related or independent mental health problems placed S.T. at a risk

of harm due to unsafe conditions in the family home and Mother's practice of leaving S.T. in the care of others without providing adequate supervision to ensure S.T.'s safety.

B. *Removal*

Mother argues the juvenile court erred in failing to make express findings that reasonable efforts were made to prevent S.T.'s removal from her care and in ordering her removed. We affirm.

1. *Reasonable Efforts*

Mother first argues that the juvenile court failed to expressly determine whether reasonable efforts had been made to prevent removal as required by section 361, subdivision (d), and that the record did not demonstrate such reasonable efforts.

When a court considers removal, it must "make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home . . . . The court shall state the facts on which the decision to remove the minor is based." (§ 361, subd. (d); see Cal. Rules of Court, rule 5.695(e).) "Failure to make the required findings [is] error. [Citations.]" (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1218.) The error, however, is harmless if it is not reasonably probable that the court would have found reasonable efforts had not been made or removal was not supported by the evidence. (*Ibid.*)

The juvenile court's oral ruling and written disposition order makes only a conclusory finding on the Department's reasonable efforts to prevent removal. The oral ruling addressed the jurisdictional allegations in detail and ordered removal without further elaboration. Taken as a whole, the oral ruling includes "facts on which the decision to remove the minor[s] [was] based" (§ 361, subd. (d)), but the court did not make the connection explicit. Assuming for purpose of argument that these findings did not satisfy the statutory standard for express findings, we conclude that any error was harmless.

Mother missed most of her meetings with the Department and most of her drug tests, as well as many of her visits with S.T. She had not timely followed through on referrals for services or sought out services on her own, which might have obviated the

need the for removal. She had lost her home to foreclosure, the other duplex unit where Mother temporarily resided was also soon to become unavailable due to foreclosure, and Mother had not reported a new residence or requested help to obtain appropriate housing. It is difficult to see what other reasonable efforts the Department could have made to prevent the need for removal when Mother failed to maintain consistent contact or take steps on her own to resolve her problems. Thus, there was no error in the reasonable efforts finding.

Mother's cited cases are distinguishable. *In re Basilio T.* (1992) 4 Cal.App.4th 155, which faulted the trial court for not considering alternatives to removal in a case of ongoing domestic violence in the presence of young children (*id.* at p. 171), has been superseded by statutory amendments. (*In re J.S.* (2014) 228 Cal.App.4th 1483, 1493–1494.) *In re Amy M.* (1991) 232 Cal.App.3d 849 and *In re Jason L., supra,* 222 Cal.App.3d 1206 both affirmed findings that reasonable efforts had been made to prevent removal (i.e., interviewing parties and witnesses to alleged sexual abuse and evaluating risk to the children) and similar efforts were made in this case.

2. *Clear and Convincing Evidence of Need for Removal*

"A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence of any of the following circumstances . . . : [¶] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody. . . ." (§ 361, subd. (c)(1).) A juvenile court's finding that this standard has been met is reviewed for substantial evidence.[11] (*In re Kristin H., supra,* 46 Cal.App.4th at p. 1654.)

[11] A split of authority exists over *how* the substantial evidence standard of appellate review should be applied to a juvenile dependency finding that must be made by clear and convincing evidence. (See, e.g., *In re Mark L.* (2001) 94 Cal.App.4th 573,

The most obvious fact supporting the court's removal order was Mother's lack of an established residence at the time of the hearing. The duplex unit had been foreclosed upon and Mother no longer lived there, Mother had not reported another residence, and Mother did not testify at the hearing. Mother's duplex neighbor testified that Mother could stay with him, but his unit had been foreclosed upon and owned by the bank as well. Other facts also supported removal, such as a lack of evidence that Mother's substance use had abated or was under treatment, or that she had obtained lawful employment or income. Additionally, any separation distress S.T. demonstrated during visits had subsided over time. Mother suggests that close supervision and court-ordered services were viable alternatives to removal. (See *In re Henry V.* (2004) 119 Cal.App.4th 522, 529.) However, given the lack of stable housing at the time of the hearing, and her prior inability to provide suitable housing, close supervision in the home did not appear to be a viable alternative.

Mother's cited cases are easily distinguishable. In *In re Jeannette S.* (1979) 94 Cal.App.3d 52, alternatives to removal were readily discernible in a case where a filthy home had led to the dependency and the mentally-ill mother had actively sought out help with parenting and homemaking. (*Id.* at pp. 56, 60–61.) In *In re Steve W.* (1990) 217 Cal.App.3d 10, dependency had been precipitated by a sibling's death at the hands of the mother's boyfriend. Although the boyfriend was incarcerated, the trial court determined removal of the remaining child was necessary to protect him from domestic violence in mother's *future* relationships with unknown persons. (*Id.* at pp. 14–16, 22–23.) The appellate court reversed, holding the basis for removal was pure speculation

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580–581 [" 'the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong"]; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654 ["we employ the substantial evidence test, however *bearing in mind the heightened burden of proof*" (italics added)].) We need not take a position on the issue because we conclude sufficient evidence supports the juvenile court's order even assuming the more demanding standard of review applies.

where the mother was participating in services, had stable housing and employment, and no evidence indicated she would not follow the court's orders. (*Id.* at pp. 22–23.)

The juvenile court did not err in ordering S.T.'s removal from Mother's care.

C. *ICWA Notice*

Mother argues the juvenile court erred in finding proper ICWA notice was provided to Indian tribes. Mother reported possible Choctaw ancestry, for which the Department had sent notice and received a response that S.T. was not eligible for tribal membership. However, J.T. reported Cherokee ancestry, and the record does not contain any notice to, or response from, the Cherokee tribes. We agree that ICWA notice was incomplete.

"[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and their right of intervention." (25 U.S.C. § 1912(a).) Circumstances that may provide "reason to know" an Indian child is involved include "a person having an interest in the child" having "provide[d] information suggesting that the child is [an Indian child]." (§ 224.3, subd. (b)(1); Cal. Rules of Court, rule 5.481(a)(5)(A), (b)(3).) Proof of notice, including copies of the notice sent and all responses received, must be filed with the court. (Cal. Rules of Court, rule 5.482(b).) The trial court must determine whether proper notice was given under the ICWA. (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 852; *In re Asia L.* (2003) 107 Cal.App.4th 498, 506.) We review the juvenile court's factual findings for substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632; see *In re Karla C.* (2003) 113 Cal.App.4th 166, 178–179.) Mother has standing to raise this issue on appeal even though the missing notice would have been based on *J.T.'s* Indian ancestry (*In re B.R.* (2009) 176 Cal.App.4th 773, 779–780), and the argument is not forfeited even though it was not raised below (*In re S.E.* (2013) 217 Cal.App.4th 610, 615).

The Department represents on appeal that, after the jurisdiction and disposition hearings, it sent notice to the Cherokee tribes and Bureau of Indian Affairs and all responded that S.T. was not eligible for membership. Thus, the Department contends any error in failing to give notice was harmless. (See *In re I.W.* (2009) 180 Cal.App.4th 1517, 1530.) The respondent's brief refers us to a request for judicial notice, but no such request was ever made. Nor has the Department moved to augment the record. Therefore, we must disregard the representation of later notice and decide the issue on the record before us. (See *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364 ["if it is not in the record, it did not happen"].)

The Department argues its duty of inquiry under ICWA was satisfied given the very limited information J.T. provided (see *In re C.Y.* (2012) 208 Cal.App.4th 34, 41 ["no duty to conduct an extensive independent investigation for information"]), and it had no duty to provide notice to the Cherokee tribes before the jurisdiction and disposition hearing because J.T. was not declared S.T.'s presumed father until that hearing. The Department relies on the ICWA's definition of "parent," which excludes an "unwed father where paternity has not been acknowledged or established." (25 U.S.C. § 1903(9).) The notice statute, however, is not triggered when a "parent" is identified, but when a person having an interest in the child provides information *suggesting* the child is an Indian child. (§ 224.3, subd. (b)(1); Cal. Rules of Court, rule 5.481(a)(5)(A), (b)(3).) And while classification as an "Indian child" frequently requires demonstration of biological connection to an Indian tribe (25 U.S.C. § 1903(4)), we question one court's broad statement that "[u]ntil biological paternity is established, an alleged father's claims of Indian heritage do not trigger any ICWA notice requirement . . . ." (*In re E.G.* (2009) 170 Cal.App.4th 1530, 1533; *id.* at pp. 1532–1533 [holding that possible Indian ancestry of an alleged father whose *lack* of biological paternity has been established does not trigger the ICWA notice requirement].) Such a conclusion is particularly unpersuasive in circumstances where paternity has been asserted by an alleged father whose biological paternity has not been excluded. (See *In re B.R., supra,* 176 Cal.App.4th at p. 785 ["[t]o

the extent *E.G.* suggests in dictum that no ICWA notice is ever required unless the minor is shown to potentially have Indian blood, we respectfully disagree"].)

Here, Mother consistently reported that J.T. was S.T.'s biological father; J.T. was the subject of a default child support judgment for S.T.; J.T. did not affirmatively contest his paternity after he was located in October 2013; C.P.'s suspicions he might be the biological father were dispelled by genetic testing in November 2013; and J.T. reported possible Indian ancestry in October 2013. By December 2013, long before the jurisdiction and disposition hearing, there was "reason to believe" S.T. might be an Indian child, and J.T. was ultimately declared the presumed father of S.T. In any event, the Indian status of a child need not be certain to invoke the notice requirement and courts have interpreted ICWA notice requirements broadly. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254, 256–257.) J.T.'s alleged failure to qualify as an ICWA "parent" before the jurisdiction and disposition hearing might have relieved the Department of a duty under the ICWA to notify *him* of the proceedings (25 U.S.C. § 1912(a) ["shall notify the parent"]), but it did not relieve the Department of a duty to notify the tribes.

Errors in notice are prejudicial unless the tribe actually participates in the proceedings, the tribe expressly indicates no interest in the proceedings, or the record clearly establishes that the minor is not an Indian child within the meaning of the ICWA. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1162; *In re Gerardo A.* (2004) 119 Cal.App.4th 988, 996.) We may, however, reverse and remand for the limited purpose of ensuring compliance with ICWA notice requirements (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 704–710). We conclude that is the appropriate disposition in this case.

III. DISPOSITION

The jurisdiction and disposition orders are reversed. The case is remanded to the juvenile court with directions to order the Department to provide notice to the Cherokee tribes in accordance with ICWA or to find that such notice had been given. If, after proper notice, the court finds S.T. is an Indian child, the court shall proceed in conformity

with ICWA. If, after proper notice, the court finds the child is not an Indian child, the jurisdiction and disposition orders shall be reinstated.

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BRUINIERS, J.

WE CONCUR:

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JONES, P. J.

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SIMONS, J.